No. 92-1594

In The

Supreme Court of the United States

October Term, 1992

Supreme Court,
FILE
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OFFICE OF THE CL

STATE OF NEBRASKA,

Petitioner,

v.

STEVEN W. CHILDS,

Respondent.

Petition For A Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the investigatory stop of an unregistered motor vehicle unreasonable within the meaning of the Fourth Amendment when made pursuant to a statute which allows the operation of "In Transit" vehicles (i.e. vehicles bearing a decal provided by dealers in motor vehicles for 15 days after purchase by which time the vehicle is to be licensed and registered) upon condition that the operator of such vehicles provides upon demand documents showing ownership or lawful possession of such motor vehicle.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, the State of Nebraska, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska entered on February 12, 1993, in *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993)

OPINIONS BELOW

The February 12, 1993, opinion of the Nebraska Supreme Court, whose judgment is herein sought to be reviewed is reported at *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993) and is reprinted in the separate Appendix to this Petition, Appendix A.

STATEMENT OF JURISDICTION

The judgment of the Nebraska Supreme Court was entered February 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves an issue concerning police conduct challenged as repugnant to the Fourth Amendment to the Constitution of the United States, which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

An Omaha police officer stopped Respondent's Ford automobile which displayed "In Transit" stickers. Officer Greg Wyant noticed Respondent's vehicle because it ". . . had no license plates on it." [12:11] All that could be read on a decal in the window were the words "in transit." [12:17] After the stop the officer asked Respondent, the driver, for a bill of sale. The officer noticed that Respondent was intoxicated and arrested him for drunk driving. [14:19]

Nebraska's statutory scheme for regulating such operation is set out in the opinion sought to be reviewed as follows:

Neb. Rev. Stat. Sec. 60-302 (Cum. Supp. 1990) provides that "[n]o motor vehicle . . . unless otherwise expressly provided, shall be operated on the highways of this state unless such vehicle is registered in accordance with Chapter 60, article 3." Any person who operates a vehicle which has not been registered is subject to the penalty for a Class III misdemeanor. See Neb. Rev. Stat. Secs. 60-302.03 and 39-6,188 (Reissue 1988). Section 60-320(3)(b), the statute in effect when Childs was arrested, provided an exception to the registration requirement: A person who purchases a motor vehicle from a licensed dealer may drive the vehicle on a Nebraska highway

> without charge or registration of such vehicle or trailer. There shall be displayed on the front and rear windows of such motor vehicle . . . a decal on which shall be plainly printed in black letters not less than two inches high the words In Transit . . . such transit decal shall allow such owner

> to operate the motor vehicle . . . for a period of fifteen days in order to effect proper registration of the new or used motor vehicle or trailer . . . Upon demand of proper authorities, there shall be presented by the person in charge of such motor vehicle or trailer, for examination, a duly executed bill of sale therefor, a certificate of title, or other satisfactory evidence of the right of possession by such person of such motor vehicle . . .

Section 60-320(5) states in part that "[i]t shall be the duty of all law enforcement officers to arrest and prosecute all violators" of the aforementioned statutes concerning registration of motor vehicles and use of In Transit decals. *State v. Childs*, 242 Neb. 426, 429, 495 N.W.2d 475 (1993). Appendix A p. 4a-5a.

How The Federal Question Was Raised

The federal question was raised in the trial court in a suppression motion which urged the trial court to exclude evidence as seized in violation of the Fourth Amendment. [T4] Appendix C p. 25a. The trial court, the District Court for Nebraska's Fourth District, denied that motion. [23:6]

The Fourth Amendment issues were raised in the appellate courts (the Nebraska Court of Appeals and the Nebraska Supreme Court) by assignment of error. Appendix D p. 26a. The Nebraska Court of Appeals in *State v. Childs*, 1 N.C.A. 478, 482 (1992) Appendix B p. 23a, affirmed the trial court holding no Fourth Amendment violation occurred. The Nebraska Supreme Court

reversed the lower courts by holding that the investigatory stop of Respondent's vehicle violated the Fourth Amendment. *State v. Childs*, 242 Neb. 426, 438, 495 N.W.2d 475 (1993). Appendix A p. 16a.

While the Nebraska Supreme Court mentions a provision of the Nebraska Constitution in addition to the Fourth Amendment, it is important to note that the Fourth Amendment is the exclusive grounds urged for exclusion in Respondent's Suppression Motion [T4] Appendix C and when the Suppression Motion was renewed at trial and overruled. [29:1-9]

The assignment of error reproduced at Appendix D likewise mentions the Fourth Amendment but makes no reference to the Nebraska Constitution.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Nebraska Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this Court or has decided an important question of federal law which has not been, but should be, settled by this Court.

While a citizen does not surrender all the protections of the Fourth Amendment by entering an automobile, *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986); the State's intrusion into a particular area, whether an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a "Constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347,

88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

Since automobiles are the subject of pervasive governmental regulation, the operator of a motor vehicle has a diminished expectation of privacy. *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

Part of the pervasive regulation of motor vehicles is the ubiquitous requirement that they be registered and carry current license plates. Within the licensing/registration sphere of State regulation is the control of under what circumstances, if any, a motor vehicle may be operated after it is purchased but before it is registered and license plates are issued for it.

Thus, if Respondent had an expectation of privacy which the Court finds reasonable, the seizure of his automobile in this investigatory stop was in violation of the Fourth Amendment and all of the evidence of his intoxication must be suppressed by virtue of the exclusionary rule. If, on the other hand, Respondent's expectation of privacy was so diminished by his involvement in the pervasively regulated activity of operating a motor vehicle that had not yet been registered or issued license plates then no Fourth Amendment violation occurred.

Effect of "Pervasive Regulation"

This Court has had several occasions to examine the impact of pervasive regulation upon a citizen's expectation of privacy.

In *New York v. Class*, above, this Court held there was no Fourth Amendment violation in a police officer's reaching into the passenger compartment of a vehicle to move papers obscuring the VIN, Vehicle Identification Number, after the vehicle's driver had been stopped for a traffic violation and had exited the car. After discussing the pervasive regulation of vehicles, the Court noted at 99 S.Ct. 965: "The factors that generally diminish the reasonable expectation of privacy in automobiles are applicable a fortiori to the VIN." Likewise the factors that generally diminish the reasonable expectation of privacy in automobiles are applicable a fortiori to one who has yet to register his vehicle and is required by statute to produce upon demand a bill of sale or its equivalent.

In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), this Court held that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. Stops of "In Transit" vehicles meet this test because such vehicles are by definition not yet registered.

Delaware v. Prouse, above, made specific reference to the presence of license plates negating the need for spot checks saying,

> Furthermore, in Delaware, as elsewhere, vehicles must carry and display current license plates, which themselves evidence that the vehicle is properly registered; . . . and, because there

> is nothing to show that a significant percentage of automobiles from other States do not also require license plates indicating current registration, there is no basis for concluding that stopping even out-of-state cars for document checks substantially promotes the State's interest. 99 S.Ct. at 1399, 1400, 400 U.S. at 660, 661.

Respondent's vehicle had no license plates.

Delaware v. Prouse, above, required an articulable basis amounting to reasonable suspicion that a vehicle is unregistered as one alternative justification for stopping a motor vehicle, 440 U.S. at 661, 99 S.Ct. at 1400. The officer who stopped Respondent upon seeing the In Transit decal thereby knew Respondent's vehicle was not yet registered.

In *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), a case involving the warrantless administrative search of a junkyard by police officers, the Court reviewed the *Colonnade-Biswell* doctrine which states that there is a reduced expectation of privacy in a closely regulated business. In addition to junkyard operation, such activities as sale of liquor *Colonnade Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); traffic in firearms *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); and mining *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981), have a history of regulation that reduces the expectation of privacy the owner or operator of such businesses enjoys. *New York v. Burger*, above, noted,

> We pointed out that the doctrine is essentially defined by "The pervasiveness and regularity of the federal regulation" and the effect of such

> regulation upon an owner's expectation of privacy. 482 U.S. at 701, 107 S.Ct. at 2643.

Likewise, driving an automobile is a "pervasively regulated" activity, *New York v. Class*, above, and since the legislature is not required to give any "grace period," that is, it could strictly prohibit operation of any vehicle without current plates and registration, the stopping of drivers during this in transit or grace period pursuant to a statute saying they are required to produce proof of ownership is reasonable.

New York v. Burger, above, quotes from *United States v. Biswell*, 482 U.S. at 701, 107 S.Ct. at 2643, saying:

> When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.

New York v. Burger, 482 U.S. at 711, 107 S.Ct. at 2648, 96 L.Ed.2d at 619, goes so far as to say that the New York statute provides a "constitutionally adequate substitute" for a warrant. Likewise in this case, an automobile bearing in transit decals and no license plates is subject to statutory regulation and its operator knows the inspection of his proof of ownership is not a discretionary act of an officer but is conducted pursuant to statute.

While we recognize the limits of the analogy between administrative inspections of regulated businesses and police stops of unlicensed cars, the failure of the Nebraska Supreme Court to apply the diminished expectation of privacy rationale of those cases in its analysis of *Delaware v. Prouse*, constitutes a conflict with this Court's guidelines.

In Nebraska when a driver chooses to engage in the pervasively regulated activity of operating an automobile and to accept the statutory privilege of operating a vehicle under an exception to the usual requirements concerning license plates and registration, he does so with the knowledge that he is subject to a stop to check his proof of ownership pursuant to statute. Therefore, no enforceable expectation of privacy is violated by such stops.

CONCLUSION

Wherefore, Peititioner, prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Nebraska in *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993). In the event that the Petition is granted, Petitioner prays that the judgment of the court below be reversed, that the cause be remanded, and that the court below be directed to affirm Respondent's Drunken Driving conviction since it was not based upon tainted and inadmissible evidence.

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APPENDIX A

STATE OF NEBRASKA, APPELLEE,
V. STEVEN W. CHILDS, APPELLANT.

242 Neb. 426, 495 N.W.2d 475 (1993)

Filed February 12, 1993. No. S-91-192.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, JERRY M. GITNICK, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

David W. Childs for appellant.

Don Stenberg, Attorney General, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

Michael F. Gutowski for amicus curiae Nebraska Civil Liberties Union Foundation.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, J.J.

SHANAHAN, J.

Pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992), this court has accepted the petition of Steven W. Childs for our review of the decision by the Nebraska Court of Appeals, namely, *State v. Childs*, 1 NCA 478 (1992), wherein the Nebraska Court of Appeals affirmed Childs' conviction of driving while under the influence of alcohol (drunk driving), in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990). At issue is the refusal of

the district court for Douglas County to suppress evidence obtained at the time of Childs' arrest and used by the State for Childs' conviction in a bench trial.

Around 2:30 a.m. on October 16, 1990, Officer Greg Wyant of the Omaha Police Division was on routine cruiser patrol near 60th and Northwest Radial Highway in Omaha when he observed a blue 1989 Ford Tempo moving on the highway. Wyant saw nothing suspicious or out of the ordinary about the general appearance of the Ford or its operation, that is, no appearance of physical deficiency on the car, such as a missing or burned-out headlight, no unusual or erratic movement, and nothing unlawful in the driver's handling of the automobile. However, from his cruiser Wyant did see "In Transit" stickers or decals displayed on the Ford's front and rear windows. At that time, Wyant did not know who was driving the Ford, although the driver was later identified as Childs. Also, Wyant had no information that a vehicle, matching the description of the Ford, or its occupant had been involved in any criminal activity. Nevertheless, Wyant stopped the Ford, walked by the "In Transit" sticker displayed on one of the Ford's windows, noted that the sticker was still within the In Transit period and was therefore, valid, and then went to the driver's window where he asked Childs for a bill of sale and motor vehicle registration for the Ford. During this exchange, Wyant noticed that Childs exhibited "symptoms of intoxication." As a result of field sobriety tests administered to Childs, Wyant arrested him for drunk driving.

After the drunk driving complaint was filed in the district court, Childs filed his suppression motion, seeking exclusion of evidence obtained as the result of

Wyant's stop which, Childs claimed, was an unlawful stop with a consequent unreasonable search and seizure contrary to U.S. Const. amend. IV and Neb. Const. art. I, § 7.

At the suppression hearing, Wyant testified about his general observations of Childs' Ford shortly before the highway stop. During his testimony, Wyant acknowledged that while he was in his cruiser and before he stopped Childs, he did see the In Transit stickers or decals displayed on the windows of Childs' car. The decals inside Childs' Ford satisfied the printing and display requirements of Neb. Rev. Stat. § 60-320(3)(b) (Reissue 1988) (window display, front and rear, of a decal on which In Transit shall be printed in black letters at least 2 inches high). As Wyant confirmed, each of the displayed decals on Childs' car was "a legal in-transit from a dealer." Wyant also testified that his sole reason or purpose for stopping Childs' car was "to check the validity of the in-transits" and that he had no information or indication that any Nebraska law or Omaha ordinance had been violated, or was being violated, by Childs, either apart from his driving or while driving the Ford that Wyant stopped.

The district court denied Childs' suppression motion. At his bench trial, Childs renewed his constitutional objection that Wyant obtained evidence in violation of Childs' right to be free from an unreasonable search and seizure by police. See, U.S. Const. amend. IV; Neb. Const. Art. I, § 7. Subject to Childs' constitutional objection, the State introduced evidence, obtained after Wyant stopped Childs, showing that Childs was under the influence of

alcoholic liquor when Wyant stopped Childs' automobile. See § 39-669.07. The Court found Childs guilty of drunk driving and imposed a sentence on him.

In Childs' appeal to the Nebraska Court of Appeals, the focal point became several Nebraska statutes pertinent to registration of motor vehicles.

Neb. Rev. Stat. § 60-302 (Cum. Supp. 1990) provides that "[n]o motor vehicle . . . unless otherwise expressly provided, shall be operated on the highways of this state unless such vehicle is registered in accordance with Chapter 60, article 3." Any person who operates a vehicle which has not been registered is subject to the penalty for a Class III misdemeanor. See Neb. Rev. Stat. §§ 60-302.03 and 39-6,188 (Reissue 1988). Section 60-320(3)(b), the statute in effect when Childs was arrested, provided an exception to the registration requirement: A person who purchases a motor vehicle from a licensed dealer may drive the vehicle on a Nebraska highway

> without charge or registration of such vehicle or trailer. There shall be displayed on the front and rear windows of such motor vehicle . . . a decal on which shall be plainly printed in black letters not less than two inches high the words In Transit. . . . Such transit decal shall allow such owner to operate the motor vehicle . . . for a period of fifteen days in order to effect proper registration of the new or used motor vehicle or trailer. . . . Upon demand of proper authorities, there shall be presented by the person in charge of such motor vehicle or trailer, for examination, a duly executed bill of sale therefor, a certificate of title, or other satisfactory evidence of the right of

> possession by such person of such motor vehicle. . . .

Section 60-320(5) states in part that "[i]t shall be the duty of all law enforcement officers to arrest and prosecute all violators" of the aforementioned statutes concerning registration of motor vehicles and use of In Transit decals.

In affirming Childs' conviction, the Nebraska Court of Appeals concluded that the district court properly denied Childs' suppression motion, since "Childs was stopped because he had In Transit stickers on his windows" and Wyant's stop was "required by § 60-320," *State v. Childs*, 1 NCA 478, 481 (1992), for the reason that

> the only way to determine if the registration is current in a newly purchased vehicle is to stop the vehicle. Pursuant to the statute these random stops may only be directed at vehicles which carry In Transit stickers. The stops shall only be made for the first 15 days of vehicle ownership, and the officer must check the bill of sale and certificate of title. This type of stop is not the "standardless and unconstrained" governmental discretionary evil about which the U.S. Supreme Court was concerned in [*Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)].

1 NCA at 481-82. The Nebraska Court of Appeals continued:

> The Nebraska statute does not grant the police "unlimited interference with the use of the highways" [*United States v. Martinez-Fuerte*, 428 U.S. 543, 559, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976)], merely a 15-day window where the motorist may be stopped, § 60-320(3)(b). Lastly,

> the motorist, recognizing that the registration date on the In Transit stickers cannot be read unless the driver is stopped, is essentially on notice, and therefore the driver's concern or fright at being stopped is appreciably less. This court agrees with the trial court that based on the record in this case, the stop was neither arbitrary, oppressive, nor an indiscriminate abuse of discretion and is therefore consistent with the Fourth Amendment.

1 NCA at 482.

SUPPRESSION OF EVIDENCE

Childs' First Assignment of Error.

As his first assignment of error, Childs claims that the district court erred by denying Childs' suppression motion concerning evidence obtained as the result of Wyant's stop and used by the State to convict Childs.

Standard of Review.

> In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally inadmissible, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In reviewing a trial court's findings on a suppression motion, an appellate court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion.

State v. Thomas, 240 Neb. 545, 547, 483 N.W.2d 527, 530 (1992). Accord, *State v. Coleman*, 239 Neb. 800, 478 N.W.2d

349 (1992). See, also, *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

CONSTITUTIONALITY OF THE STOP

State's Burden.

"If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure." *State v. Staten*, 238 Neb. at 21, 469 N.W.2d at 118. Accord, *State v. Thomas, supra; State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989); *State v. Abdouch, supra; State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied* 484 U.S. 863, 108 S.Ct. 180, 98 L.Ed.2d 133.

Constitutional Guarantee Against Unreasonable Search and Seizure.

Both the U.S. Const. amend IV and Neb. Const. art. I, § 7, guarantee "[t]he right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated."

Thus, to determine whether evidence obtained after, and produced by, Childs' stop was constitutionally inadmissible, we must first determine whether Wyant's stopping Childs' car violated U.S. Const. amend. IV or Neb. Const. art. I, § 7.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the U.S. Supreme Court considered the right to privacy of a person who, while walking on a public

street, was stopped and searched by police. In *Terry*, the Court observed:

> The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). . . . Unquestionably [Terry] was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland.

392 U.S. at 8-9.

Thus, a motorist on a public highway or street may have a legitimate expectation of privacy within a motor vehicle, or, as expressed in *Delaware v. Prouse*, 440 U.S. 648, 662, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979): "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." See, also, *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986).

In *Delaware v. Prouse, supra*, a case involving a police officer's discretionary spot check for a driver's license

and motor vehicle registration, the U.S. Supreme Court also stated:

> The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. . . . The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order " 'to safeguard the privacy and security of individuals against arbitrary invasion. . . . ' " *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

440 U.S. at 653-54.

Investigatory Stops; Basis.

"[P]olice can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment." *State v. Staten*, 238 Neb. 13, 18, 469 N.W.2d 112, 116 (1991). Accord, *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). "Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than

the level of suspicion required for probable cause." *State v. Staten*, 238 Neb. at 18, 469 N.W.2d at 116-17.

Reasonable suspicion, as a prerequisite for a constitutional investigatory stop, cannot be based only on a police officer's desire to verify compliance with motor vehicle registration statutes. In *Delaware v. Prouse, supra*, the U.S. Supreme Court emphatically rejected arbitrary police stops for the sole purpose of conducting a regulatory inspection of vehicles or drivers and offered the following observation and condemnation:

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations – or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered – we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.

440 U.S. at 661.

If police, for an investigatory purpose, unconstitutionally stop a person, evidence obtained by a search of the person stopped is constitutionally inadmissible as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). See *State v. Thomas, supra*.

> In *Wong Sun*, the U.S. Supreme Court required exclusion not only of evidence directly produced by a constitutionally invalid search but

> also evidence indirectly derived from the unconstitutional search. Reference to "fruit of the poisonous tree" in *Wong Sun* is a condemnation of the government's subsequent exploitation of a prior violation of a defendant's constitutional right. As expressed in *Wong Sun*, whether evidence is the derivative product of a constitutionally invalid search turns on the question " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " 371 U.S. at 488. (Quoting from J. Maguire, Evidence of Guilt (1959).)

State v. Abdouch, 230 Neb. 929, 943-44, 434 N.W.2d 317, 326 (1989). Accord *State v. Thomas, supra*. Thus, evidence obtained by an unreasonable search and seizure, including evidence that is indirectly derived from the unconstitutional search and seizure, is constitutionally inadmissible in a criminal trial.

Although there may be some circumstances " 'in which wholly lawful conduct might justify the suspicion that criminal activity was afoot.' " *State v. Thomas*, 240 Neb. at 559, 483 N.W.2d at 537 (quoting from *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980)), to determine whether stopping a person on a public street is constitutionally permissible, a court must assess all the circumstances surrounding the stop, including "all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be

engaged in criminal behavior." *State v. Ebberson*, 209 Neb. 41, 45, 305 N.W.2d 904, 907 (1981).

In its opinion rendered in Childs' appeal, the Nebraska Court of Appeals cited *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), as support for its conclusion that Wyant's stop of Childs was constitutionally permissible. However, *Martinez-Fuerte* can be readily distinguished from Childs' case: (1) In *Martinez-Fuerte*, the questioned stop occurred at a permanent border checkpoint, whereas Wyant stopped Childs while he was in the process of lawfully driving on a public street, and (2) according to the U.S. Supreme Court, decreasing the number of illegal entrants into the United States was a national policy, but posed formidable law enforcement problems. Ensuring compliance with vehicular registration statutes does not rise to the level of, and cannot be compared with, the enforcement of immigration laws in conjunction with a national policy.

Moreover, in *Martinez-Fuerte*, the Court recognized that random and roving patrol stops were constitutionally intolerable because such stops " 'would subject the residents of [the area] to potentially unlimited interference with their use of the highways, solely at the discretion of [police].' " 428 U.S. at 558-59. Therefore, *Martinez-Fuerte* and its involvement of a legitimate and permanent or stationary checkpoint is inapplicable to Childs' case.

DID WYANT CONSTITUTIONALLY STOP CHILDS?

In our analysis of the undisputed testimony, Wyant, before stopping Childs, had no indication and, therefore, no real or factually based suspicion that Childs had been engaged in, was presently engaged in, or was about to engage in any criminal activity. According to Wyant, the sole and simple basis for his stopping Childs' car was to "check if the vehicle was within the in-transit period."

The State asserts that Wyant had a particularized suspicion that Childs was violating § 60-302 because, in every situation where a motorist drives a car displaying an In Transit decal, "the officer who sees a car being driven on a street without plates should suspect a violation is occurring in his presence." Brief for appellee at 6. If the State's argument that an In Transit plate furnishes a particularized suspicion of lawbreaking, and, therefore, criminal activity, the result would be a constitutionally suspect presumption that every motorist who uses In Transit decals is presumed to be a lawbreaker involved in criminal activity. Yet, "[t]he presumption of innocence, although unarticulated in the U.S. and Nebraska Constitutions, is a basic component of a defendant's fair trial and, therefore, an aspect of due process in the criminal justice system." *State v. Jasper,* 237 Neb. 754, 759, 467 N.W.2d 855, 859 (1991). Accord *State v. Harney,* 237 Neb. 512, 466 N.W.2d 540 (1991). See, also, *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

Moreover, § 60-302, read in conjunction with § 60-320(3)(b), authorizes operation of a motor vehicle for 15 days provided that the vehicle properly displays In Transit decals.

It is true that § 60-320(3)(b) states that

> [u]pon demand of proper authorities, there shall be presented by the person in charge of such motor vehicle or trailer, for examination, a duly executed bill of sale therefor, a certificate of title, or other satisfactory evidence of the right of possession by such person of such motor vehicle or trailer.

However, the preceding statute does not direct police to stop all vehicles displaying In Transit decals. Hence, the inescapable questions are: For a stop to check the validity of In Transit decals, what is the standard for a police officer's stopping a particular vehicle but not another? On what basis does an officer stop an In Transit motorist from among all other In Transit motorists who, for all appearances and purposes, are lawfully traveling on a public highway or street? None of the Nebraska statutes implicated in Childs' case supplies a reasonable standard for stopping a motorist whose vehicle displays In Transit decals. Moreover, whatever might be statutorily prescribed or authorized for stopping In Transit motorists is subject to the constitutional safeguard against an unreasonable search and seizure. Without a reasonable standard for stopping motorists to check the validity of In Transit decals, a distinct and perhaps substantial segment of the motoring public is left to random and roving stops by police in the " 'unfettered discretion of officers in the field.' " *State v. Crom*, 222 Neb. 273, 277, 383 N.W.2d 461, 463 (1986) (quoting from *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 367 (1979)).

When faced with a question similar to that in Childs' appeal, courts in at least two other states have held that

police exceed their authority for an investigatory stop of a vehicle when the basis for the stop is solely the display of temporary or In Transit license plates, placards, or decals. See *State v. Chatton*, 11 Ohio St. 3d 59, 63, 463 N.E.2d 1237, 1240 (1984), *cert. denied* 469 U.S. 856, 105 S.Ct. 182, 83 L.Ed.2d 116: "[O]nce the police officer herein observed the temporary tags, appellee could no longer be reasonably suspected of operating an unlicensed or unregistered vehicle." See, also, *State v. Farley*, 308 Or. 91, 94, 775 P.2d 835, 836 (1989): "Upon seeing the temporary permit, the justification of any investigation was vitiated. Plain and simple, the officer had no statutory authority to proceed further. That authority ended with the officer's discovery that the traffic infraction he was investigating had not actually occurred."

We cannot accept that every motorist who operates a vehicle displaying In Transit decals waives the protection against an unconstitutional stop and invalid search and seizure as a consequence of the stop. First, even if In Transit decals were issued in return for a motorist's waiver of the constitutional protection against an unreasonable search and seizure, surrender of the constitutional guarantee in exchange for In Transit decals might well be too costly and excessive a price to pay for driving a vehicle on a public highway or street. Second, assuming that a waiver of the protection against an unreasonable search and seizure were constitutionally permissible under the circumstances, none of the evidence in Childs' case supports existence of a waiver, "the voluntary and intentional relinquishment of a known right, privilege, or claim, [which] may be demonstrated by or inferred from a person's conduct." *State v. Kennedy*, 224 Neb. 164, 170,

396 N.W.2d 722, 726 (1986). Accord, *Ehlers v. Perry, ante* p. 208, ___ N.W.2d ___ (1993); *Stuhr v. Stuhr,* 240 Neb. 239, 481 N.W.2d 212 (1992); *State v. Clear,* 236 Neb. 648, 463 N.W.2d 581 (1990).

We believe that there are other, less intrusive means to check the validity of In Transit decals without random and roving stops for that purpose. However, we decline to comment about those other available means, lest our expression be an intrusion into the province of the legislative or executive branch, or both branches, appropriately controlling operation of motor vehicles on public highways and streets. Consequently, we hold that because Wyant lacked a reasonable and articulable suspicion or basis for the conclusion that Childs had been involved, was presently involved, or was about to become involved in any criminal activity, Wyant's stopping Childs violated U.S. Const. amend. IV and Neb. Const. art. I, § 7. See, *State v. Thomas,* 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Coleman,* 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Twohig,* 238 Neb. 92, 469 N.W.2d 344 (1991); *State v. Staten,* 238 Neb. 13, 469 N.W.2d 112 (1991). For that reason, the district court, pursuant to Childs' suppression motion and his constitutional objection renewed at trial, should have suppressed and excluded the convictive evidence obtained after Wyant unconstitutionally stopped Childs. Since the State has used constitutionally inadmissible and tainted evidence to convict Childs, his conviction should have been set aside.

DUE PROCESS

Childs also contends that the State's dismissing the charge against him in the county court, after that court had sustained his suppression motion, and then refiling the same charge in the district court violates his right to due process. However, in view of our conclusion that the stop of Childs was unconstitutional, we need not address the due process question.

CONCLUSION

In light of our holding in this further review of Childs' appeal, we reverse the judgment of the Nebraska Court of Appeals, reflected in *State v. Childs*, 1 NCA 478 (1992), and remand this cause to the Nebraska Court of Appeals with direction that the Nebraska Court of Appeals shall enter judgment reversing the district court's conviction of Childs and remand Childs' case to the district court for further proceedings.

APPENDIX B

STATE OF NEBRASKA, APPELLEE,
V. STEVEN W. CHILDS, APPELLANT.

Filed May 19, 1992. No. A-91-192. (1 NCA 478)

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

David W. Childs for appellant.

Don Stenberg, Attorney General, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

Michael F. Gutowski for amicus curiae Nebraska Civil Liberties Union Foundation.

CONNOLLY, IRWIN, AND MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Steven W. Childs, appellant, was stopped by an Omaha police officer to verify the validity of "In Transit" stickers posted on Childs' vehicle. After the stop, Childs was noted to appear intoxicated and was subsequently arrested for driving while under the influence of alcohol. Childs filed a motion to suppress the evidence seized on the grounds that the stop had violated his Fourth Amendment right to be free from unreasonable search and seizure. The motion was granted at the county court level. The State of Nebraska dismissed the action and refiled in the district court, pursuant to Neb. Rev. Stat. § 29-827 (Reissue 1989). The district court overruled Childs' motion to suppress. Childs was found guilty of driving while under the influence and now appeals the district court's ruling on the motion to suppress and asserts that

the refiling of the case in district court violated Childs' due process rights. For the reasons recited below, we affirm the ruling of the district court.

When reviewing a trial court's ruling on a motion to suppress, the court will uphold the ruling unless it finds that the ruling was clearly erroneous. *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992); *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991); *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990).

Childs was stopped by an Omaha police officer at 2:30 a.m. on October 16, 1990. The officer stopped Childs to verify the validity of In Transit stickers posted on the vehicle's windows. The officer could only read the words "In Transit" on the sticker prior to stopping the car. After asking Childs for a bill of sale and registration, he noted that Childs was exhibiting symptoms of intoxication. Childs was requested to perform field sobriety tests, which he failed, and the officer arrested him for driving while under the influence of alcohol (DWI).

Childs filed a motion to suppress evidence relating to the DWI, which was granted by the Douglas County Court. The State then dismissed the action in the county court, pursuant to § 29-827, and refiled in the Douglas County District Court. Childs filed another motion to suppress, which was overruled on February 6, 1991, and the case went to trial. Childs timely objected at trial to the district court's denial of the suppression motion and subsequently perfected this appeal.

Childs presents essentially two issues on appeal. First, Childs contends that the vehicle stop to check the validity of the In Transit stickers violated his rights under

the Fourth Amendment to be free from unreasonable search and seizure. Second, Childs contends that the procedure utilized by the State, pursuant to § 29-827, of filing a complaint in the district court after an adverse ruling on a motion to suppress in a county court constitutes a denial of Childs' due process rights.

SEARCH AND SEIZURE

The Nebraska Legislature requires that a motor vehicle operated on the highways in Nebraska must be registered. Neb. Rev. Stat. § 60-302 (Reissue 1988). Any person who operates a vehicle which has not been registered is subject to penalty. Neb. Rev. Stat. § 60-302.03 (Reissue 1988). At the time of this incident a person who purchased a motor vehicle was permitted to drive the vehicle without registration for 15 days, provided an In Transit decal was displayed on the front and rear windows of the vehicle. Neb. Rev. Stat. § 60-320(3)(b) (Reissue 1988).

> Upon demand of proper authorities, there shall be presented by the person in charge of such motor vehicle or trailer, for examination, a duly executed bill of sale therefor, a certificate of title, or other satisfactory evidence of the right of possession by such person of such motor vehicle or trailer.

Id.

Additionally, the statute stated that "[i]t *shall* be the duty of all law enforcement officers to arrest and prosecute all violators" of the above-cited provisions. (Emphasis supplied.) § 60-320(5).

The Nebraska Supreme Court addressed the issue of enforcing the state's licensing laws in *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975). In *Holmberg* a Nebraska trooper stopped the defendant's vehicle for the purpose of checking his operator's license, pursuant to Neb. Rev. Stat. § 60-435 (Reissue 1974). However, the court held that the statute, which authorized random stops of motorists, was not unconstitutional; that stopping the vehicle was the only practical method of enforcing the law; and that the inconvenience to the motorist was slight compared to the benefits derived to the state. *Id.* The court added that if facts indicated the stop was a pretext to search for some evidence of some possible crime, the stop would be arbitrary and unreasonable. *Id.*

Since *Holmberg*, the U.S. Supreme Court has held that stopping an automobile and detaining its occupants constitutes a "seizure" within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). Unless an officer has probable cause or some other "substantial and objective standard or rule to govern the exercise of discretion" the stop will be a violation of the Fourth Amendment. 440 U.S. at 661. In *Prouse* the officer had arbitrarily stopped the motorist because he had no other calls. His stop was not based on any suspicion that the motorist was violating the law. Neither was he "acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General." 440 U.S. at 650. The Supreme Court also stated that it did not appear that "a stop of a Delaware-registered vehicle is necessary in order to

ascertain compliance with the State's registration requirements. . . . " 440 U.S. at 660.

In contrast to *Prouse,* in the case at bar, Childs was stopped because he had In Transit stickers on his windows. The officer's stop was regulated *and* required by § 60-320. The officer testified that, unlike checking for valid license plates, the only way to determine if the registration is current in a newly purchased vehicle is to stop the vehicle. Pursuant to the statute these random stops may only be directed at vehicles which carry In Transit stickers. The stops shall only be made for the first 15 days of vehicle ownership, and the officer must check the bill of sale and certificate of title. This type of stop is not the "standardless and unconstrained" governmental discretionary evil about which the U.S. Supreme Court was concerned in *Prouse.* 440 U.S. at 661.

Although the Fourth Amendment is implicated in stopping a vehicle, the type of stop authorized by the statute in the case at bar "involves only a brief detention of the travelers during which ' "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document. . . . " ' " (Citation omitted.) *United States v. Martinez-Fuerte,* 428 U.S. 543, 558, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). In *Martinez-Fuerte* the Supreme Court held that a Border Patrol's stopping of vehicles at permanent check points on major highways to question occupants concerning alien status was consistent with the Fourth Amendment. The Supreme Court weighed the minimal intrusion upon a motorist's privacy interest in his car against the public interest in curbing the flow of illegal aliens. It reiterated its concern that roving patrol stops were intolerable

because they would subject lawful motorists to " 'unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. . . . ' " 428 U.S. at 559. The fixed checkpoints were acceptable because the interference with the legitimate traffic was minimal and officers who were not in the field determined the location of the checkpoints, thus avoiding the possibility of discretionary abuse by field officers.

The Nebraska statute does not grant the police "unlimited interference with the use of the highways," *id.*, merely a 15-day window where the motorist may be stopped, § 60-320(3)(b). Lastly, the motorist, recognizing that the registration date on the In Transit stickers cannot be read unless the driver is stopped, is essentially on notice, and therefore the driver's concern or fright at being stopped is appreciably less. This court agrees with the trial court that based on the record in this case, the stop was neither arbitrary, oppressive, nor an indiscriminate abuse of discretion and is therefore consistent with the Fourth Amendment. The court notes that this case is controlled by the 15-day grace period of § 60-320(3)(b) (Reissue 1988) which has since been superseded by § 60-320(3)(b) (Supp. 1991), which provides for a 30-day grace period. The court expresses no view on the appropriateness of a search under § 60-320(3)(b) (Supp. 1991).

PROCEDURAL DUE PROCESS

Childs also asserts that his due process rights were violated when the State refiled the complaint in district court after an adverse ruling on a motion to suppress in the county court.

Section 29-827 states as follows:

> Where motions to suppress . . . are made in courts inferior to the district court in cases involving violations of state laws, the county attorney may give notice to such court that the property in question will be further required as evidence, may then dismiss the action in such court and refile the complaint in the district court.

The Nebraska Supreme Court reviewed this statute in *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988). In *Dail* the defendant filed a motion to suppress which the county court sustained. The State then moved for a dismissal pursuant to § 29-827. The county court dismissed the complaint without prejudice and ordered any property in evidence to be transferred to the district court. The Nebraska Supreme Court held that jeopardy attaches when a judge begins to hear evidence as to the guilt of the defendant and that in disposing of a pretrial motion, jeopardy does not attach. *Id.* See, also, *State v. Chamley*, 223 Neb. 614, 391 N.W.2d 99 (1986). The facts in *Dail* are essentially the same as in the case at bar. Accordingly, we find that the refiling of the case in district court does not violate defendant's due process rights.

AFFIRMED.

APPENDIX C

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. STEVEN W. CHILDS, Defendant.	DOC 128 PAGE 163 MOTION TO SUPPRESS (Filed Jan. 29, 1991)

Comes the Defendant and moves the court to suppress the evidence obtained by Plaintiff in the above encaptioned case based on the denial of Defendant's Fourth Amendment right to reasonable search and seizure by the Plaintiff since the arresting officers stopped Defendant with neither probable cause that a crime was being committed or about to be committed, nor did the officers have any other reasonable excuse for stopping Defendant.

Wherefore Defendant prays the court to suppress all evidence obtained by Plaintiff subsequent to the unlawful stop by Plaintiff.

Dated this 29 Day of January, 1991.

Signed: /s/ David W. Childs
David W. Childs
Attorney for Defendant
#17558
3422 N. 93 St. #3
Omaha, NE 68134
571-3268

APPENDIX D

ASSIGNMENTS OF ERROR

1.) The trial court erred in refusing the Motion to Suppress for the following reasons:

a. The State of Nebraska presented no evidence that the seizure of the Defendant was based on specific, objective facts indicating the Defendant, in particular, required seizure.

b. The State of Nebraska presented no evidence that the seizure of the Defendant was based on a larger plan, such as a roadblock, or a plan which otherwise entailed neutral limitations on the conduct of the police officer.

c. The State of Nebraska presented no evidence that the officer had any reasonable suspicion, based on objective facts, that the Defendant was involved in any criminal activity.

d. The trial court's statement that this sort of search and seizure is the least intrusive method of enforcing the registration laws runs counter to the Supreme Court's express will that random stopping to enforce registration laws is impermissible under the Fourth Amendment.